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Proposed Interim Class Counsel

[Additional counsel appear on signature page]

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE: 23ANDME, INC., CUSTOMER
DATA SECURITY BREACH LITIGATION

MDL No. 3098

Master Case No. 3:23-cv-05147-EMC

This Document Relates To:

ALL ACTIONS

**MOTION TO APPOINT M. ANDERSON
BERRY AND GAYLE M. BLATT AS INTERIM
CO-LEAD CLASS COUNSEL AND MELISSA
K. EMERT AND MAUREEN K. BERG AS
EXECUTIVE COMMITTEE MEMBERS FOR
THE CLASS**

Date: May 30, 2024

Time: 1:30 p.m.

Courtroom: 5, 17th Floor

I. INTRODUCTION

Pursuant to Transfer Order of MDL No. 3098, thirty-nine centralized class actions filed against Defendants 23andMe, Inc., 23andMe Pharmacy Holdings, Inc., and 23andMe Holding Co. (collectively, “23andMe” or “Defendants”) stemming from a data breach first reported by Defendants on October 6, 2023, have been transferred to this Court for coordinated pretrial proceedings. *In re: 23andMe, Inc., Customer Data Security Breach Litigation*, MDL No. 3098 (N.D. Cal.) (ECF. 19).

Plaintiffs Monica Santana, Paula Kleynburd, Bonnie Eden, Daniel Pinho, Thomas Seawright, Pamela Zager-Maya, Adriane Farmer, Harold Velez, and Brianna Sorenson respectfully move this Court to appoint Gayle M. Blatt and M. Anderson Berry as co-lead counsel and appoint Melissa K. Emert and Maureen K. Berg as members of an Executive Committee, pursuant to Fed. R. Civ. P. 23(g). In support of our application for leadership, we address below the issues requested by the court. (ECF No. 78)

A. Work Performed on this Case to Date

Our team has been involved in this case since the onset of the litigation. Mr. Berry represents the plaintiffs in the first-filed complaint, *Santana et al. v. 23ANDME, INC.*, No. 3:23-cv-05147-EMC. Ms. Blatt and Mr. Berry and the proposed Executive Committee members (collectively “Proposed Interim Class Counsel”) have performed substantial work investigating the breach from the very first hints of its occurrence, gathering all publicly available data, performing substantial research into the breach, its effects, its reach, identifying the type of information published on the dark web, as well as research into Defendants’ business and business practices. Furthermore, they have retained and collaborated closely with well qualified experts, who are leaders in the areas of cyber-security and business valuation, in efforts to ascertain the full scope of the data breach, the ramifications for the class and what potential solutions might be appropriate to address the issues of concern to the class. This work is ongoing.

Proposed Interim Class Counsel have worked collaboratively with other plaintiffs’ counsel to share information and ideas in an attempt to either resolve this matter or determine how to best proceed through litigation. Mr. Berry and Ms. Blatt have taken a *de-facto* leadership role, along with a few other plaintiffs’ counsel, in this litigation already. Mr. Berry and Ms. Blatt have been integral in the *two* mediation sessions to date with the Defendant. Those sessions have illuminated important information

1 regarding the case, Defendant's positions, and Defendant's current financial situation, all of which merit
2 consideration as the case proceeds.

3 Additionally, Proposed Executive Committee members Melissa Emert and Maureen Berg have
4 also been involved in this case since its inception, have engaged in researching the facts of the case, have
5 prepared Complaints, attended the initial mediation and have spoken with numerous class members and
6 addressed issues with the retained cyber-security consultant. Ms. Emert and Ms. Berg have substantial
7 data privacy experience, having been involved in scores of cases, involving millions of impacted class
8 members.

9 Proposed Interim Class Counsel have also already consulted with reputable and experienced
10 Settlement Administrators to determine, among other things, how best to notify this class and reach as
11 many impacted persons as possible. Proposed Interim Class Counsel have substantial experience
12 exploring methods of increasing claims rates.

13 Further, after the initial class action complaints were filed, Proposed Interim Class Counsel were
14 contacted by various Class Members and Plaintiffs regarding the fact that 23andMe had recently informed
15 them that it was updating its Terms of Service ("TOS"). This proposed change had the potential to
16 materially impact class members who did not understand that they had the right to opt-out of the new
17 TOS. The communication from 23andMe did not provide the Class Members any opportunity to compare
18 the new TOS to the prior TOS they had already potentially agreed to, let alone provide them with any
19 information about what was being changed. Proposed Interim Class Counsel investigated the situation,
20 met and conferred with Defendant's counsel regarding our position on the legality of their actions, and
21 requested information from Defendant regarding its intentions towards the Class.

22 When resolution of this issue was not forthcoming, Proposed Interim Class Counsel, together
23 with supporting counsel, prepared a motion to request a curative notice to the class pursuant to Fed. R.
24 Civ. Pro. 26 (d). Proposed Interim Class Counsel then learned that other counsel had, without consultation,
25 set a mediation with Defendant, and Proposed Interim Class Counsel agreed to attend so long as there
26 was transparency with other Plaintiffs' counsel regarding the mediation. After this initial mediation was
27 unsuccessful, Proposed Interim Class Counsel continued to discuss settlement options with Defendant
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and to consult with other Plaintiffs' counsel, which led to a second mediation, which, while still unsuccessful, helped to narrow the issues at stake and make progress towards resolving this matter in a way which is favorable to the Class and its interests.

Proposed Interim Class Counsel's Experience

Gayle Blatt's Experience

Ms. Blatt is a partner in the law firm of Casey Gerry Schenk Francavilla Blatt & Penfield, LLP ("Casey Gerry"), where she leads the firm's Complex Litigation Practice Group. With almost four decades of experience, she has dedicated her entire career to vindicating the rights of individuals and consumers, playing a pivotal role in complex, high-profile litigation cases, resulting in the recovery of billions of dollars for consumers. She has substantial experience in class actions related to privacy and data security, as well as automotive defects, and banking fraud.

The subject matter of this case is not new to her, having previously been appointed to numerous lead and executive positions in data breach cases. As detailed more fully below and in the firm resume attached to the Joint Declaration of Gayle M. Blatt and M. Anderson Berry ("Joint Decl.") as Exhibit A, both Ms. Blatt and Casey Gerry are leaders in class action litigation throughout California and beyond.

Of particular relevance here, Ms. Blatt notably was appointed to the five-member Plaintiffs' Executive Committee overseeing the litigation related to the massive Yahoo! data breaches, collectively at the time, the largest data breach in the world. (*In re: Yahoo! Inc. Customer Data Security Breach Litigation*, Case No. 16-MD-02752 (N.D. Cal.)). In this capacity, she oversaw the drafting of the consolidated master complaint, opposed motions to dismiss, drafted discovery, took/defended depositions, worked with damages experts and participated in settlement negotiations.

Ms. Blatt has had numerous other lead/co-lead and executive committee appointments in data security cases, some of which include, *In re: Warner Music Group Data Breach*, Case No. 1:20-cv-07473-PGG (S.D.N.Y.); *In re: Netgain Technology, LLC, Consumer Data Breach Litigation*, 21-cv-1210-SRN-LIB (D. Minn.); *DeSue v. 20/20 Eye Care Network, Inc. et al.*, Case No. 21-cv-61275-RAR (S.D. Fla.); *James v. Davaco, Inc. et al.*, Case No. 3:21-cv-02318-M (N.D. Tex.); *Pfeiffer et al. v. RadNet, Inc.*, Case No. 2:20-cv-09553-RGK-SK (C.D. Cal.); *Adkins v. Facebook, Inc.*, Case No. 18-05982-WHA

(N.D. Cal.) (Law And Briefing Committee); *Tate v. EyeMed Vision Care, LLC*, Case No. 21-cv-00036-DRC (S.D. Ohio); *In re: Citrix Data Breach Litigation*, Case No. 19-cv-61350-RKA (S.D. Fla.); *Madrid v. Golden Valley Health Centers*, Merced Super. Ct., Case No. 20-cv-01484; *Sung et al., v. Schurman Fine Papers d/b/a Schurman Retail Group*, Case No. 17-cv-02760-LB (N.D. Cal.); *In re: Sony Gaming Networks and Customer Data Security Breach Litigation*, Case No. 11-md-02258-AJB (S.D. Cal.); *In re: Waste Management Data Breach Litigation*, Case No. 1:21-cv-06199-DLC (S.D.N.Y.); and *In re: US Fertility LLC Data Security Litigation*, Case No. 8:21-cv-00299 (D. Md.).

In addition to data privacy litigation, Ms. Blatt has also held other leadership roles in multidistrict litigation. Along with her colleagues at Casey Gerry, she has been a leader in public service and has been the honored recipient of numerous accolades as detailed in her firm resume.

M. Anderson Berry's Experience

Mr. Berry is the head of the Complex Litigation Department at the Clayeo C. Arnold, APC ("Arnold Law Firm"), with an extensive background in privacy and consumer/government fraud litigation, actively participating in a currently sealed False Claims Act case involving widespread cybersecurity fraud upon the United States. Before joining the Arnold Law Firm in 2017, Mr. Berry worked as an Assistant United States Attorney for the Eastern District of California. As part of the Affirmative Civil Enforcement unit, Mr. Berry handled a wide variety of complex cases, recovering millions of dollars for the United States. While working as an Assistant United States Attorney Mr. Berry worked closely with diverse Federal and State agencies including the Federal Bureau of Investigations and the California Attorney General's office. Before working for the Department of Justice, Mr. Berry practiced at one of the world's largest law firms, Jones Day, where he represented clients in international arbitration and complex commercial litigation, including defending class action allegations.

Mr. Berry is litigating a number of class action cases across the country involving data breaches, including the following matters where he has a leadership position: *In Re: Overby-Seawell Company Customer Data Security Breach*, No. 1:23-md-03056-SDG (N. Ga.) (Co-Lead Counsel); *In Re: Entertainment Partners Data Breach Litigation*, No. 2:23-cv-06546-CAS (C.D. Cal.) (Co-Lead Counsel); *In Re: Snap Finance Data Breach Litigation*, No. 2:22-cv-00761-TS (D. UT.) (Co-Lead

Counsel); *Holmes v. Elephant Insurance Company, et al.*, No. 3:22-cv-00487-JAG (E.D.VA.) (Co-Lead Counsel); *In Re: Arthur J. Gallagher Data Breach Litigation*, No. 1:21-cv-04056 (N.D.Ill.) (Co-Lead Counsel); *In re: Mednax Servs., Inc., Customer Data Security Breach Litig.*, No. 21-MD-02994 (S.D. Fla.) (Executive Comm.); *Desue v. 20/20 Eye Care Network, Inc. et al.*, No. 0:21-cv-61275 (S.D. Fla.) (Executive Comm.); *Ware v. San Geronio Memorial Hosp.*, CVRI2301216 (Super. Ct. of CA, Riverside) (Co-Lead Counsel); *In re: Cerebral, Inc. Privacy Practices*, No. 2:23-cv-01803-FMO (C.D. Cal.) (Liaison Counsel); *In re: Orrick, Herrington & Sutcliffe, LLP Data Breach Litig.*, No. 3:23-cv-04089-SI (N.D. Cal.) (Plaintiffs' Steering Committee); *In re: Sequoia Benefits and Insurance Data Breach Litig.*, No. 3:22-cv-08217-RFL (N.D. Cal.) (Plaintiffs' Executive Committee) See Joint Decl., Exhibit B (Mr. Berry and Clayeo C. Arnold, APC's Biography)

Moreover, Mr. Berry has additional recent experience in District Courts in California, including this District, having been appointed class counsel in numerous data breach class action cases in this court, including: *In re: Ethos Technologies Inc. Data Breach Litig.*, No. 3:22-cv-09203-SK (N.D. Cal.); *In re: Blackhawk Network Data Breach Litig.*, No. 3:22-cv-07084-CRB (N.D. Cal.); *Remoundos v. LendUS, LLC*, No. 22-cv-00749-EMC (N.D. Cal.); *Bitmouni v. Paysafe Payment Processing Solutions, LLC*, No. 3:21-cv-00641-JCS (N.D. Cal.); *In re: Hanna Andersson and Salesforce.com Data Breach Litig.*, No. 3:20-cv-00812-EMC (N.D. Cal.); *Myron Schellhorn et al v. Timios, Inc.*, No. 2:21-cv-08661-VAP-JC (C.D. Cal.), *Hashemi et al. v. Bosley, Inc.*, No. 2:21-cv-00946 (CD. Cal.), *Bowdle v. King's Seafood Co. LLC*, No. 8:21-cv-01784-CJC-JDE, (CD. Cal.), and *In Re: Entertainment Partners Data Breach Litigation*, No. 2:23-cv-06546-CAS-PVCx (CD. Cal.).

Melissa R. Emert's Experience

Ms. Emert, a partner at KGG and co-chair of KGG's consumer class action practice, has been representing aggrieved consumers and investors for more than 30 years. Ms. Emert's practice specializes in consumer class actions with an emphasis on data breach, privacy and product defect cases. She has litigated consumer cases throughout the United States and holds prominent positions in many large MDLs and non-MDL consumer class actions. As an endorsement of her expertise, substantial experience and successful results, Ms. Emert was named as one of two women attorneys in the country who received the

highest number of appointments to leadership structures in nationwide MDLs by the Judges overseeing those MDLs.¹ Ms. Emert is currently prosecuting numerous data breach/privacy class actions as either co-lead or an executive committee member. *Morales v. Conifer Revenue Cycle Solutions, LLC*, 2:23-cv-01987 (C.D. Ca. 2024) (Court appointed Co-Lead Counsel); *In re: Illuminate Education Data Security Incident Litigation*, 8:22-cv-1164 (C.D. Cal. 2022) (Court appointed Co-Lead Counsel); *In re: American Financial Resources, Inc. Data Breach Litigation*, 2:22-cv-02392 (D.N.J. June 10, 2022) (Court appointed Interim Class Counsel); *In Re: Blackbaud, Inc., Customer Data Breach Litigation*, 3:20-mn-02972 (D. S.C. February 16, 2021) (Court appointed Steering Committee Member); *Tate, et al., v. EyeMed Vision Care, LLC*, 1:21-cv-36 (S.D. OH March 22, 2021) (Court appointed Executive Committee Member); *In re: Google Location History Litig.*, 5:18-cv-05062-EJD (N.D. Cal. 2019) (Court appointed Interim Class Counsel).

Ms. Emert has also had leadership positions in the following data breach/privacy actions that have resulted in class wide settlements: *Cercas et al., v. Ambry Genetics Corp.*, 8:20-cv-00791 (C.D. Cal. 2020) (Court appointed Executive Committee Member); *In re Morgan Stanley Data Sec. Litig.*, 1:20-cv-05914 (S.D.N.Y. 2020) (Court appointed Executive Committee); *In re Wawa, Inc. Data Breach Litigation*, No. 19-cv-6019 (E.D. Pa. 2019) (Co-Chair of Plaintiff's Vetting Committee); *Echavarria, et al. v. Facebook, Inc.*, 18-cv-05982 (N.D. Cal. 2018) (Class Representative Communications and Client Vetting Committee); *In Re: Sonic Corp. Customer Data Sec. Breach Litig.*, 1:17-md-02807 (N.D. Ohio 2017) (Plaintiff's Steering Committee).

Adding to her experience and expertise in litigating complex matters, Ms. Emert has also been appointed co-lead and other court appointed positions in large, complex MDL and non-MDL class actions that have required the same focus and depth of litigation that the present action will require. See, e.g., *Carder v. Graco Children's Prods., Inc. et al.*, 2:20-cv-137-LMM (N.D. Ga.) (Co-Lead Counsel); *In re: Daily Fantasy Sports Litig.*, 1:16-md-02677-GAO (D. Mass) (Co-Lead Counsel); *In re: Hill's Pet*

¹ See, "There Are New Faces Leading MDLs, and They Aren't All Men" Law.com, July 7, 2020. <https://www.law.com/2020/07/06/there-are-new-faces-leading-mdls-and-they-arent-allmen/>

1 *Nutrition, Inc. Dog Food Prods. Liab. Litig.*, 19-md-2887 (D. Kan.) (Plaintiffs' Executive Committee);
 2 *In re: Intel Corp. CPU Mktg. & Prods. Liab. Litig.*, 3:18-md-02828 (D. Or.) (Plaintiffs' Steering
 3 Committee); *In re: Apple Device Performance Litigation*, 5:18-md-02827 (N.D. Cal.) (Plaintiffs'
 4 Executive Committee); *In re: German Auto. Mfrs. Antitrust Litig.*, 3:17-md-02796 (N.D. Cal.)
 5 (Plaintiffs' Executive Committee).

6 **Maureen Kane Berg's Experience**

7 Maureen Kane Berg is Senior Counsel at Lockridge Grindal Nauen PLLP. Her practice is
 8 concentrated in the firm's data breach, antitrust, business litigation, and securities litigation practice
 9 groups. For the past several years, she has been on the forefront of cutting-edge cybersecurity and privacy
 10 litigation, representing individuals in data breach and data disclosure litigation. Ms. Berg has been
 11 substantially involved in complex class action matters in data breach and other substantive areas in
 12 federal and state courts, including: *In re: Capital One Consumer Data Security Breach Litigation*, No.
 13 19-md-02915 (E.D. Va.); *In re: Geico Customer Data Breach Litigation*, No. 21-cv-2210 (E.D.N.Y.);
 14 *Stallone v. Farmers Group, Inc., et al.*, No. 21-cv-01659 (D. Nev.); *Park v. American Family Life*
 15 *Insurance Company et al.*, No. 22-cv-00171 (W.D. Wis.); *Baysal v. American Family Life Insurance*
 16 *Company et al.*, No. 23-cv-002942 (Dane Cty. Cir. Ct.- Wisc.); *Baysal v. Midvale Indemnity Company*
 17 *et al.*, No. 21-cv-00394 (W.D. Wis.); *Greenstein et al. v. Noblr Reciprocal Exchange*, No. 21-cv-04537
 18 (N.D. Cal.); *In re: MGM Resorts International Data Breach Litigation*, No. 20-cv-00376 (D. Nev);
 19 *Williams v. Duke Health*, No. 22-cv-00727 (M.D.N.C.); *Weddle et al. v. WakeMed*, No. 22-cv-13860-
 20 910 (Wake Cty. Gen. Ct. – N.C.); *In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 17-
 21 cv-03768 (E.D. Pen.); *In re Facebook, Inc. Customer Privacy User Profile Litigation*, No. 18-02843
 22 (N.D. Cal); *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 16-md-2724 (E.D. Pa.); *In*
 23 *re Medtronic, Inc. Shareholder Litigation*, No. 27-cv-14-11452 (Minn.); *Shores et al v. Premera Blue*
 24 *Cross*, No. 15-01268 (D. Or.); *In re: Turkey Antitrust Litigation*, No. 19-cv-08318 (N.D. Ill.); *Wood*
 25 *Mountain Fish LLC v. Mowi ASA, et al.*, No. 19-22128 (S.D. Fla.); *In re Zetia (Ezetimibe) Antitrust*
 26 *Litigation*, No. 18-md-2836 (E.D. Va.).
 27
 28

1 **B. *Allocation of Work to Avoid Duplication***

2 Proposed Interim Class Counsel recognizes the desire for efficiency balanced against the financial
3 and professional resources necessary to effectively litigate this matter, and the goal of achieving diversity
4 among counsel. In order to ensure effective management and efficient resolution of this litigation,
5 Proposed Interim Class Counsel has attached, as **Exhibit A**, clear guidelines for the allocation of work
6 among counsel, intended to minimize duplication of effort, and maintain cost efficiencies, while
7 providing more junior associates opportunities to participate meaningfully in this litigation.

8 Under these guidelines the appointed leadership shall coordinate closely to delineate
9 responsibilities and tasks, taking into account the respective expertise and resources of each counsel and
10 their firm. For example, Melissa Emert has a wealth of experience in Plaintiff vetting and discovery and
11 Maureen Berg excels at research and briefing (among other things). Regular communication channels
12 will be established to facilitate collaboration and information sharing, thereby minimizing redundant
13 efforts and maximizing efficiency in pursuing the litigation. Additionally, a centralized approach to
14 document management and case administration will be implemented to streamline processes and reduce
15 administrative costs. By adhering to these principles, the Proposed Interim Class Counsel will effectively
16 advance the interests of the class members while maximizing the utilization of available resources.

17 **C. *Proposed Case Plan***

18 Although settlement negotiations are proceeding, challenges exist in effectively addressing
19 appropriate benefits for the nearly 7 million affected 23andMe customers with varying claims. These
20 challenges include, but are not limited to: Defendant's resources; ongoing financial and managerial issues
21 with the company; Defendant's claimed defenses; and other issues inherent in many data security cases.
22 As such, Proposed Interim Class Counsel believe that the case should proceed on dual tracks. Settlement
23 negotiations should continue while a litigation schedule is in place to afford the class a timely resolution
24 on either course. Mr. Berry and Ms. Blatt have been involved in negotiations over the last few months
25 with other counsel, including Mr. Siegel, but are also committed to litigating the case if negotiations are
26 not successful. For this reason, this matter will require a tightly planned and coordinated approach to
27 litigation, moving through the pleading phase to discovery and beyond, all while settlement negotiations
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potentially continue. Proposed Interim Class Counsel propose the attached Case Plan as a way to continue to move this case forward even as settlement negotiations continue. A proposed case plan is attached hereto as **Exhibit B**.

D. *Plaintiffs and their Counsel Supporting Proposed Interim Class Counsel's Application*

In order to manage such a complex matter, with both litigation and settlement tracks, Proposed Interim Class Counsel will have to coordinate with a diverse group of lawyers representing many different Plaintiffs. Such coordination will require lead counsel to have the support, trust, and assistance, of that diverse group. Proposed Interim Class Counsel have the support of the attorneys set forth below, representing a large number of the Plaintiffs in the centralized cases. All of the firms listed in the chart below support Proposed Interim Class Counsel for Co-Lead Class Counsel and Plaintiff's Executive Committee.

No.	Case Name	Plaintiffs' Counsel
1	<i>Santana, et al.</i> , 3:23-cv-05147-EMC	Edelsberg Law; Shamis & Gentile
2	<i>Andrizzi</i> , 5:23-cv-05198-EMC	Srourian Law Firm
3	<i>Eden, et al.</i> , 4:23-cv-05200-EMC	Kantrowitz Goldhamer
4	<i>J.S., et al.</i> , 5:23-cv-05234-EMC	McShane & Brady
5	<i>Mirza</i> , 3:23-cv-05259-EMC	Kazerouni Law
6	<i>Greenberg</i> , 5:23-cv-05302-EMC	Milberg Coleman; Kopelowitz Ostrow
7	<i>Hoffman, et al.</i> , 3:23-cv-05332-EMC	Zimmerman Law Office; DannLaw; Milberg Coleman
8	<i>Velez</i> , 5:23-cv-05464-EMC	Lockridge Grindal
9	<i>Smith</i> , 5:23-cv-05548-EMC	Migliaccio & Rathod
10	<i>Furia</i> , 4:23-cv-05565-EMC	Gustafson Gluek; Migliaccio & Rathod
11	<i>Vickery</i> , 3:23-cv-05635-EMC	Wolf Haldenstein; Trostrud Law Group
12	<i>Vasquez</i> , 23cv424996-CFA	Wucetich & Korovilas
13	<i>Sorensen</i> , 5:23-cv-05677-EMC	Federman & Sherwood
14	<i>Dube</i> , 3:23-cv-05768-EMC	Milberg Coleman; Levin Sedran
15	<i>Paddy, et al.</i> , 4:23-cv-06698-EMC	Stueve Siegel Hanson
16	<i>Seikel</i> , 3:23-cv-05419-EMC	Cuneo Gilbert; Neal & Hartwell

CONCLUSION

For all of the foregoing reasons the Court should appoint Gayle M. Blatt and M. Anderson Berry as Interim Co-Lead Class Counsel and Melissa K. Emert and Maureen K. Berg as members of Plaintiffs' Executive Committee.

Respectfully submitted,

Dated: April 24, 2024

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